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CHUBB INSURANCE MALAYSIA BHD (DAHULUNYA DIKENALI SEBAGAI ACE JERNEH INSURANCE BHD) v. ALLIANZ GENERAL INSURANCE COMPANY (MALAYSIA) BHD

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COURT OF APPEAL, PUTRAJAYA
RAVINTHRAN PARAMAGURU JCA
HASHIM HAMZAH JCA
SM KOMATHY SUPPIAH JCA
[CIVIL APPEAL NO: W-O2(NCC)(W)-1989-10-2021]
2 APRIL 2024

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Abstract – *The court, in its determination on the true construction of a claims cooperation clause in a facultative reinsurance contract between the parties, would adopt the interpretation that best serves the underlying purpose of the reinsurance contract. In the reinsurance contract containing follow the settlement clause and claims cooperation clause, the parties must make it abundantly clear in an unequivocal and clear language of their intentions. If the claims cooperation clause is not expressed to be a condition precedent, the reinsured is not bound to follow it. However, in relying on the follow the settlements clause, which is based on the principle of good faith, the reinsured must act with utmost good faith and in a business-like manner.*

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INSURANCE: *Reinsurance – Construction of reinsurance contract – Claim under reinsurance contract – Reinsurance contract contained follow the settlement clause and claims cooperation clause – Whether interpretation that best served underlying purpose of reinsurance contract ought to be adopted – Whether reinsurer bound by follow the settlement clause – Whether claims cooperation clause takes precedence over follow the settlements clause – Whether reinsured complied with obligations under claims cooperation clause – Whether reinsured acted in good faith and business-like manner in processing and settling claim under original insurance – Whether reinsurer bound to indemnify reinsured in respect of settlement made*

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The respondent, Allianz General Insurance Company (M) Bhd ('Allianz'), was the lead insurer under a Machinery Breakdown Insurance Policy ('original policy') covering Prai Power ('Prai'). As the lead insurer, Allianz assumed 55% of the risk with the remaining risks taken up by co-insurers. Allianz ceded out part of the risks to various reinsurers, including the appellant, Chubb Insurance Malaysia Bhd ('Chubb'), under a facultative reinsurance contract. Chubb took up 6% of the 55% risk under the reinsurance contract, which contained a back-to-back cover on the same terms as the main policy with a follow the settlements clause and a claims cooperation clause. Prai, who subsequently suffered physical damage to the compressor section of the gas turbine, causing a forced outage ('loss'),

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notified Allianz of the loss and made a claim on the policy ('claim'). Allianz, in turn, notified the reinsurers of the claim and promptly appointed a loss adjuster from MSM International Adjusters (M) Sdn Bhd ('McLarens') and, on McLarens' advice, appointed Power Engineering ('PE') as its technical expert to investigate the root cause of the breakdown. The matter was also referred to the Global Law Alliance ('GLA'), who then issued a comprehensive legal opinion advising that policy liability attached, and Allianz was liable to pay Prai's claim under the policy. Allianz, having accepted the opinion, notified the reinsurers that it would pay the claim. McLarens, subsequently, issued its final report adjusting the loss to RM72 million and pursuant to a negotiation between Allianz and Prai, the claim was settled at RM71.5 million. Allianz made cash calls for reinsurers to pay their respective shares of the settlement sum. All the other reinsurers, save and except for Chubb, paid their respective shares of the settlement sum. Chubb refused on the ground that the claim brought by Prai did not come within the policy and Allianz had failed to act in a proper and business-like manner in the investigation and settlement of the claim. Hence, the present action by Allianz against Chubb to recover its 6% share of the settlement sum on the basis of the follow the settlements clause in the reinsurance contract. Chubb resisted the claim by filing a defence and counterclaim seeking a declaration that Allianz was not entitled to rely on the follow the settlements clause as it was in breach of the claims cooperation clause and sought general damages for the breach. The trial judge allowed Allianz's claim, holding that Chubb was bound, pursuant to the follow the settlements clause, to indemnify Allianz and dismissed Chubb's counterclaim. Hence, this appeal. The issues that arose for the court's determination were, *inter alia*: (i) whether compliance by Allianz with the claims cooperation clause was a condition precedent to any liability on the part of Chubb to indemnify Allianz under the reinsurance contract in respect of the Allianz settlement with Prai; (ii) whether Allianz complied with the claim's cooperation clause; and (iii) whether Chubb was bound, pursuant to the follow the settlements clause, to indemnify Allianz.

Held (dismissing main appeal with costs and appeal on award of pre-judgment interest; dismissing Allianz's cross-appeal):

(1) A reinsurance contract is essentially a contract that provides insurance for insurers whilst, a follow the settlements clause is a clause in a reinsurance contract that binds a reinsurer to any settlement made between the reinsured and the original insured. The reinsurer is bound to indemnify the reinsured in respect of any settlement made and has no say in the claims handling process or settlement of the loss under the underlying policy. Parties could contract out of, or limit, the follow settlements clause but clear words would be required to prevent a reinsured from enforcing a settlement against the reinsurer under the

follow the settlements clause. In interpreting a claims cooperation clause, the court must adopt the interpretation that best serves the underlying purpose of the reinsurance contract. (paras 12, 14 & 39)

(2) In insurance and reinsurance contracts it is imperative that parties wishing to modify the scope of the follow the settlements clause should do so clearly and unambiguously. The manner in which the claims cooperation clause was drafted reflected that it was not the intention of the parties that the claims cooperation clause takes precedence over the follow the settlements clause. The clause did not say Allianz must comply with the claims cooperation clause before it could take the benefit of the follow the settlements clause. In such a circumstance, the claims cooperation clause should be given an interpretation which favours the true purpose of the reinsurance contract, which is to give the reinsured protection from having to bear a large loss on its own. Chubb's submission that compliance with the claims cooperation clause was a condition precedent to any liability on its part under the policy to indemnify Allianz was thus rejected. (paras 40-42)

(3) Allianz had provided all information relating to the claim to all reinsurers including Chubb and there was no complaint of not receiving information. Hence, Chubb's complaints about long term service agreement ('LTSA') and the GLA recovery report were baseless. Allianz had valid reasons and was entitled to withhold disclosure of the documents on the basis of conflict of interest and confidentiality. The LTSA was confidential information as it contained substantive technical details relating to maintenance and service methodologies for the equipment. Further, Chubb's failure to refer to the LTSA in its witness statements refuted its allegation that it was an important document for the purposes of the claim made by Prai. In fact, Allianz was willing to disclose the GLA report on Chubb confirming that it was not involved in providing any liability coverage to GE so as to avoid disclosing information to a counter party in litigation to its detriment. However, Chubb did not cooperate. (paras 48, 49, 51 & 53)

(4) Under the claims cooperation clause, Allianz, as the lead insurer, was entitled to seek Chubb's opinion on any issue relating to the claim but the former was not bound or obliged to accept such views. Allianz, having considered Chubb's views on the claim and the exclusion clauses, decided to go with the views expressed by its experts, comprising the adjusters, technical consultants and lawyers that Prai's claim was payable. Also, there was nothing in the claims cooperation clause which permitted Chubb to engage its own loss adjusters to investigate the underlying loss. Hence, there was no obligation on the part of Allianz to work with Chubb's adjuster, Integra Technical Services. Allianz not wanting to follow Chubb's way of handling the

claim, did not *ipso facto* mean that Allianz was in breach of the claims cooperation clause. Allianz had thus complied with its obligations under the claims cooperation clause. (paras 56-59)

(5) The follow the settlements clause is based on the principle of good faith and requires the reinsured to act in good faith to recover under it. There is no evidence to show that the catastrophic breakdown was inevitable and not a sudden and foreseeable loss. In any event, in our judgment, given that there is a back-to-back coverage between the original policy and the reinsurance contract as reflected in the follow the settlements clause, there is no obligation to prove that the loss fell within the original policy. Therefore, the claim that Allianz settled with Prai fell within the reinsurance as a matter of law. (paras 61, 64 & 65)

(6) The exclusion clauses were rightly determined to be inapplicable by Allianz. Allianz acted with utmost good faith, and in a business-like manner, when processing and settling Prai's claim. There were other reinsurers involved in this case and Allianz had duly notified the reinsurers when the claim was made and appointed international loss adjusters with substantial experience to investigate into the loss. The reinsurers were kept informed of the claims handling throughout and the adjuster provided updates and advice consistently. It is unlikely that all the reinsurers would have followed Allianz's settlement if indeed Allianz had not acted properly and in a business-like manner in settling Prai's claim. In the circumstances, Alliance had acted in a professional and business-like manner in handling and settling the claim. (paras 67-70)

(7) Section 11 of the Civil Law Act 1956 vests discretionary power on the court to award pre-judgment interest in respect of the recovery of debt and damages by a party. There was no reason to disturb the trial judge's exercise of discretion to award interest to Allianz. Equally, there was no merit in the cross-appeal as Allianz was only entitled to recover disbursements which were necessary for the litigation, and only to the extent that they were reasonable. Allianz's claim for an upward revision of the disbursement sum to RM448,284.94, was unreasonable. As such, there was no reason to vary the award. (para 72)

Case(s) referred to:

Aegis English Electrical And Gas International Services Ltd v. Continental Casualty CA [2008] Lloyd's Report 17 ***(refd)***

Eagle Star Insurance Co Ltd v. JN Cresswell & Ors [2004] 2 All ER (Comm) 244 ***(dist)***

Gan Insurance Co Ltd v. Tai Ping Insurance Co Ltd [2002] EWCA Civ 248 ***(dist)***

Insurance Co Of The State Of Pennsylvania v. Grand Union Insurance Co Ltd & Anor [1989] LRC (Comm) 55 ***(refd)***

The Insurance Co Of Africa v. Scor (UK) Reinsurance Co Ltd [1985] 1 Lloyd's Rep 312 ***(dist)***

Legislation referred to:
Civil Law Act 1956, s. 11
Contracts Act 1950, ss. 40, 52, 53

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[Editor's note: For the High Court judgment, please see Allianz General Insurance Company (Malaysia) Bhd v. Chubb Insurance Malaysia Bhd (Formerly Known As Ace Jerneh Insurance Bhd) [2018] CLJU 825; [2018] 1 LNS 825 (affirmed).]

Reported by S Barathi

JUDGMENT

SM Komathy Suppiah JCA:

Introduction

[1] The central issue in this appeal is the true construction of a claims cooperation clause in a facultative reinsurance contract between the appellant (Chubb) as the reinsurer and respondent (Allianz) as the reinsured. The reinsurance contract between the parties contained a follow the settlements clause and a claims cooperation clause.

Background Facts

[2] The background facts are fully set out in the judgment under appeal, to which reference can be made. Only a brief summary is needed here.

[3] Allianz was the lead insurer under a Machinery Breakdown Insurance Policy ("the original policy") covering Prai Power (Prai). As the lead insurer, Allianz assumed 55% of the risk with the remaining risks taken up by co-insurers. Allianz ceded out part of the risks to various reinsurers, including Chubb, under a facultative reinsurance contract. Chubb took up 6% of the 55% risk under the reinsurance contract.

[4] The reinsurance contract contained, a back-to-back cover on the same terms as the main policy with a follow the settlements clause and a claims cooperation clause.

[5] On 18 July 2015, Prai suffered physical damage to the compressor section of the gas turbine causing a forced outage (the "loss"). The gas turbine was manufactured by General Electric ("GE"). GE was also responsible for the maintenance and repair of the gas turbine at the plant pursuant to a Long-Term Service Agreement ("LTSA") entered into between GE and Prai.

[6] On 24 July 2015, Prai notified Allianz of the loss and made a claim on the policy (the "claim"). Allianz, in turn, notified the reinsurers of the claim and promptly appointed a loss adjuster, Mr Lum Siew Wai of MSM

International Adjusters (M) Sdn Bhd ("McLarens"), to initiate investigations. On McLarens' advice, Allianz appointed Power Engineering (PE) as its technical expert to investigate the root cause of the breakdown.

[7] PE subsequently issued three reports. In its report, PE identified that the breakdown was because of high cycle fatigue caused by the wear and tear of the S5V1 Vane in the turbine which caused it to break and the broken pieces cascaded through the rows of rotating blades and vanes causing catastrophic damage. This caused the compressor section to fail aerodynamically, affecting combustion and turbine exhaust temperatures. The gas turbine then tripped due to overheating.

[8] Additionally, Allianz also referred the matter to Global Law Alliance ("GLA"), a Singapore legal firm, for a legal opinion on policy liability. On 18 January 2016, GLA issued a comprehensive legal opinion advising that policy liability attached and Allianz was liable to pay Prai's claim under the policy. Thereupon, Allianz accepted the opinion and notified the reinsurers that it would pay the claim. At this juncture, Chubbs raised some queries about whether the claim brought by Prai was covered under the original policy.

[9] On 31 May 2016, McLarens issued its final report adjusting the loss to RM72 million. Allianz then negotiated with Prai and settled the claim at RM71.5 million. Allianz then made cash calls for reinsurers to pay their respective shares of the settlement sum. All the other reinsurers save and except for Chubb, paid their respective shares of the settlement sum. Chubb refused on the ground that the claim brought by Prai did not come within the policy and Allianz had failed to act in a proper and business-like manner in the investigation and settlement of the claim.

[10] This prompted Allianz to institute the present action against Chubb to recover its 6% share of the settlement sum amounting to RM4,503,881.22 on the basis of the follow the settlements clause in the reinsurance contract. Chubb resisted the claim by filing a defence and counterclaim seeking a declaration that Allianz was not entitled to rely on the follow the settlements clause as it was in breach of the claims cooperation clause and sought general damages for the breach.

[11] On 24 September 2022, the trial judge held that Chubb was bound, pursuant to the follow the settlements clause, to indemnify Allianz. Accordingly, he allowed Allianz's claim with interest and costs and dismissed Chubb's counterclaim. Hence, this appeal.

What Is A Reinsurance Contract, Follow The Settlements And Claims Cooperation clause

[12] It is appropriate to start with what is a reinsurance contract. A reinsurance contract is essentially a contract that provides insurance for insurers. In other words, reinsurance is insurance that an insurance company

(reinsured) purchases from a reinsurance company (reinsurer) to insulate itself from the risk of massive financial exposures. The nature of reinsurance is very different from that of direct insurance. The reinsured in a reinsurance contract will always be an insurer.

[13] No single insurance company is capable of taking on a massive risk by itself. Reinsurance facilitates the spreading of risks among the reinsurers with the primary insurer maintaining its position as the contracting party with the insured. In this case, it is evident that Allianz as the reinsured had entered into the reinsurance contract with Chubb and the other reinsurers as the coverage for the Prai power plant for material damage and consequential business interruption loss was in excess of RM3.3 billion.

[14] A follow the settlements clause is a clause in a reinsurance contract that binds a reinsurer to any settlement made between the reinsured and the original insured. The reinsurer is bound to indemnify the reinsured in respect of any settlement made and has no say in the claims handling process or settlement of the loss under the underlying policy. There is no obligation on the reinsured to cooperate or obtain the prior approval or consent of the reinsurers to settle or pay the claim. The underlying philosophy of follow the settlements clause is that a reinsurer must trust the reinsured in respect of any settlement it makes, and the reinsured is granted a free hand in the conduct of the claim under the underlying policy.

[15] The inclusion of a follow the settlements clause is essentially for the purpose of promoting the efficient and commercial settlement of claims by attempting to minimise disputes with reinsurers, especially in the context of multi-layer/subscription insurance. An unqualified follow the settlements clause would enable the reinsured to recover under the reinsurance contract without the need to prove the claim is covered under the underlying policy subject to two requirements laid down in the *Scor* case (at [18 and 60]).

[16] As it became impossible for the reinsurer to obtain evidence in regard to the manner in which the settlement was reached and if the reinsured had made the settlement in good faith or otherwise, claims cooperation clauses were introduced to mitigate the problem by allowing a reinsurer to exercise a degree of control over a reinsured who has the benefit of a follow the settlements clause. A claims cooperation clause may require the sharing of information and cooperation between the reinsured and reinsurer or may require the reinsured to obtain the reinsurer's consent before settling a claim under the underlying policy.

[17] The cases on the subject show that the inclusion of both a follow the settlements clause and a claims control or claims cooperation clause can give rise to disputes between the reinsured and reinsurer as to which clause prevails or takes priority over the other. The English Court of Appeal considered this conundrum in three leading cases, namely *The Insurance Co*

Of Africa v. Scor (UK) Reinsurance Co Ltd [1985] 1 Lloyd's Rep 312 ('*Scor*') *Gan Insurance Co Ltd v. Tai Ping Insurance Co Ltd* [2002] EWCA Civ 248 ("*Tai Ping*") and *Eagle Star Insurance Co Ltd v. JN Cresswell & Ors* [2004] 2 All ER (Comm) 244 (*Eagle Star*). We will examine these cases later in this judgment.

The Follow the Settlements Clause and Claims Cooperation Clause In This Case

[18] As mentioned earlier at [4], the reinsurance contract in the present appeal, among other terms, contained a follow the settlements clause and a claims cooperation clause. They were in these terms:

> Follow the settlements clause
>
> The Reinsurance is subject to the same Terms, Clauses, Warranties, Exceptions, Conditions, Extensions and Endorsements as the original and follows its settlement as far as applicable here to (excluding rate, retention and limit).
>
> Claims cooperation clause
>
> Notwithstanding anything to the contrary contained in this reinsurance, it is a condition of this reinsurance that:
>
> (a) the reinsured shall give to the reinsurer(s) written notice as soon as reasonably practicable of any claim made against the reinsured in respect of the business reinsured hereby or of its being notified of any circumstances which could give rise to such a claim.
>
> (b) the reinsured shall furnish the reinsurer(s) with all information known to the reinsured in respect of claims or possible claims notified in accordance with (a) above and shall thereafter keep the reinsurer(s) fully informed as regards all developments relating thereto as soon as reasonably practicable.
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> (c) the reinsurers shall co-operate with the reinsurer(s) and any other person or persons designated by the reinsurers in the investigation, adjustment and settlement of such claim notified to the reinsurer(s) as aforesaid.

Scor, Tai Ping And *Eagle Star*

[19] At this juncture, we think it apposite to first examine the decisions in *Scor, Tai Ping* and *Eagle Star* alluded to at [17] before dealing with the issues and arguments in this appeal. The tension between the competing duties and obligations of a reinsured and a reinsurer under a claims cooperation clause and follow the settlements clause is well illustrated by these decisions.

[20] In *Scor*, the plaintiffs issued a fire insurance policy. The policy was issued in respect of a building called the Old Customs Building in Monrovia, Liberia. The building was later totally destroyed by fire. ATC was in possession of the building as lessees. ATC made a claim on the policy against the insurers who failed to pay. ATC then sued the insurers and obtained judgment against the insurers in Liberia. The insurers then paid ATC and claimed against the defendants who were the lead reinsurers under a follow the settlements clause. In their defence, the reinsurers pleaded that the reinsured failed to comply with the claims cooperation clause and thus, they were not bound to indemnify the reinsured under the follow the settlements clause as the settlement was without their consent.

[21] The follow the settlements clause and claims cooperation clause in the *Scor* case read as follows:

> Follow the settlements clause
>
> ... Being a Reinsurance of and warranted same ... terms and conditions as to follow the settlements of the Insurance Company of Africa.
>
> Claims cooperation clause
>
> It is a condition precedent to liability under this insurance that all claims be notified immediately to the underwriters subscribing to this policy and the reinsured hereby undertake in arriving at the settlement of any claim that they will co-operate with the reinsurer underwriters and that no settlement shall be made without the approval of the underwriters subscribing to this policy.

[22] In examining the clauses, Goff LJ stated:

> There is, I consider, an inconsistency between (1) a follow settlements clause, the underlying philosophy of which is that reinsurers to make settlements of claims, and (2) an undertaking in a claims cooperation clause, the underlying philosophy of which is that settlements shall not be made without the approval of reinsurers ...
>
> In my judgment the undertaking by the insurers not to make a settlement without the approval of reinsurers must have been intended to circumscribe the power of insurers to make settlements binding upon reinsurers, so that reinsurers would only be bound to follow a settlement when it had received their approval. In other words, the follow settlements clause must be construed in its context in the policy, containing as it does a claims cooperation clause in this form, as only requiring reinsurers to follow settlements which are authorised by the policy, *ie*, those which have received their approval, though presumably reinsurers can, it they wish, waive that requirement This effectively emasculates the follow settlements clause; but it is nevertheless, in my judgment, what the parties to a policy in this form have agreed.

In the present case, there was no settlement by the respondents which had received the approval of the appellants. It follows that the respondents cannot here invoke the follow settlements clause.

[23] In *Tai Ping*, the claims cooperation clause read:

Notwithstanding anything contained in the reinsurance agreement and/or policy wording to the contrary, it is a condition precedent to any liability under this policy that:

(a) the reinsured shall, upon knowledge of any circumstances which may give rise to a claim against them, advise the reinsurers immediately and in any event not later than 30 days;

(b) the reinsured shall co-operate with reinsurers and/or their appointed representatives subscribing to this policy in the investigation and assessment of any loss and/or circumstances giving rise to a loss; and

(c) no settlement and/or compromise shall be made and liability admitted without the prior approval of reinsurers.

[24] The Court of Appeal held that the claims cooperation clause took precedence over the follow the settlements clause and the reinsurers were not bound to follow the settlement as it had not received their approval. In this regard, Mance LJ stated:

[28] Here, by contrast the wording is very specific. Its apparent intention is clear. Nothing in the nature of any of its three sub-clauses suggests to me that it was or can have been intended to be directed simply to situations in which insurers might subsequently invoke the full reinsurance clause ...

[29] Mr Railton [counsel for Tai Ping] submitted that, since sub-cl. (c) deals with settlements and compromises, the condition precedent that it involves can readily be limited to the application of the 'follow the settlements' provision in the full reinsurance clause. That is an ingenious argument, but, even on Tai Ping's interpretation of sub-cl. (c), it would be very difficult to reconcile with the opening words of the claims cooperation clause. The present case, unlike *Scor and Vesta v. Butcher*, is one where the words really brook no doubt.

[25] And, in *Eagle Star*, the claims cooperation clause was to this effect:

The company agrees:

(a) To notify all claims or occurrences likely to involve the underwriters within seven days from the time that such claims or occurrences become known to them.

(b) The underwriters hereon shall control the negotiations and settlements of any claims under this policy. In this event the underwriters hereon will not be liable to pay any claim not controlled as set out above.

[26] The Court of Appeal noted that although the reinsurer's right to control the negotiations and settlement as set out in para. (b) was not expressed as a condition precedent, but the phrase "will not be liable to pay any claim' were strong words, if not the language of condition precedent, at any rate the language of exclusion." The court thus held that the reinsurer was not liable to indemnify the reinsured as the latter had settled the claim without their knowledge or consent.

[27] It is clear that in *Scor*, *Tai Ping* and *Eagle* the reinsured was not allowed to rely upon the follow the settlements clause to seek indemnity as the claims cooperation clause in these cases was worded to require the reinsurer to only follow settlements that had received their consent. The cases illustrate that if parties desire to emasculate the scope of the follow the settlements clause, it is necessary to make this abundantly clear in unequivocal and unambiguous language. We forbear to quote the numerous other authorities cited by the parties which are all to the same effect on the question.

Issues Raised On Appeal

[28] The issues the parties have raised in this appeal are:

(i) whether compliance by Allianz with the claims cooperation clause was a condition precedent to any liability on the part of the Chubb to indemnify Allianz under the reinsurance contract in respect of the Allianz settlement with Prai;

(ii) whether Allianz complied with the claim's cooperation clause; and

(iii) is Chubb's bound, pursuant to the follow the settlements clause, to indemnify Allianz?

The Parties Respective Arguments On Appeal

Chubb

[29] It is submitted by Chubb that the opening phrase of the claims cooperation clause, "Notwithstanding anything to the contrary contained in this reinsurance, it is a condition of the reinsurance ..." shows that the said clause takes precedence over the follow the settlements clause. It is argued that the order of performance of the claims cooperation clause and the follow the settlements clause has been fixed by the opening phrase. And, as such, Allianz must comply with its obligations under the claims cooperation clause before it can rely on the follow the settlements clause to seek payment. This submission is based on ss. 52 and 53 of the Contracts Act.

[30] Chubb further argued that the presence or absence of the label condition precedent in the claims cooperation clause is not decisive, if there is a clear expression of intention on the wording of the clause that it should be treated as a condition precedent, and that apparent intention cannot simply be ignored.

[31] It is next contended that Allianz cannot recover under the follow the settlements clause as it was in breach of its obligations under the claims cooperation clause as it did not cooperate with Chubb in the investigation, adjustment and settlement of the claim made by Prai.

[32] In the alternative, Chubb contended that if it is found that Allianz is entitled to rely on the follow the settlements clause, it is nevertheless not entitled to recover as it did not act honestly and in a proper and business-like manner when it processed and allowed the claim. It is said that Allianz should not have settled the claim as it was not covered under the original policy and/or excluded under the original policy by operation of Exclusions 4.5 and 7.

Allianz

[33] In response, Allianz submitted that a condition incorporated in a insurance or reinsurance contract does not become a condition precedent unless it is expressly provided so. It denied that its right to rely upon the follow the settlements clause was conditional upon it complying with its obligations under the claims co-operation clause.

[34] Allianz contended that in any event it was not in breach of its obligations under the claims co-operation clause.

[35] Allianz maintained that it is entitled to recover under the follow the settlements clause as it has fulfilled the two requirements laid down in the *Scor* case.

Issue (i) Whether The CCC Is A Condition Precedent

[36] We turn now to consider whether the words used in the opening phrase of the claims co-operation clause supports Chubb's submission that the clause was intended to prevail over follow the settlements clause.

[37] Chubb had canvassed the same arguments before the learned trial judge, but it was rejected by him. The trial judge explained:

> [50] Before this Court, Chubb's main argument to contend that the Claims Cooperation clause supersedes the Follow the Settlements clause is pegged on the words "Notwithstanding ..." (hereinafter will be referred as the "Preceding Words"). With respect, this Court is unable to agree with the contention of Chubb. The said phrase must only be read to mean that the cooperation to be granted to the reinsurers must override all other obligations. The cooperation is confined to the three (3) areas stated in the said clauses. They are (i) to notify the reinsurers of the claim, (ii) provide relevant information to keep reinsurers informed, and (iii) cooperate in the claims handling process.
>
> [77] It is the firm view of this Court that the manner the Claims Cooperation clause was worded in the way it was reflects the intention of the parties that the Claims Cooperation clause should not be treated

as a condition precedent. Unlike the examples in *Scor* and *Gan Insurance*, there are no express words stipulating that the Claims Cooperation clause in the present case is a condition precedent. There is also no express undertaking to obtain consent of Chubb before settlement is made.

[78] The Preceding Words cannot be construed as a clause that emasculates the Follow the Settlement clause in the manner which the Claims Cooperation clause did in *Scor*. There is no express wordings or express undertaking that can be read as emasculating the Follow the Settlements clause.

[79] Again, it is reiterated that the Preceding Words purely refer to the obligation of Allianz to provide ail the necessary cooperation to Chubb. It emphasises the importance of providing cooperation.

[80] It must be borne in mind that both Chubb and Allianz are seasoned players in the insurance and reinsurance industry. Such a fundamental departure from the accepted practice in the reinsurance contract would demand clear and precise wordings being drafted into clauses that take away the primacy of the Follow the Settlements clause. The importance of the Follow the Settlements clause or also known as Follow the Fortune clause will be discussed below.

[38] The focus here is on the opening words. We accept that the issue of which clause takes precedence over the other would depend on the words used on their true and proper construction. It is glaring that the claims co-operation clause in this case is differently worded from the cases discussed at [17] to [26]. It is not expressed to be a condition precedent, nor does it require Allianz to obtain the approval or consent of the reinsurers to settle Prai's claim. Next, and crucially it does not spell out what is the consequence if Allianz fails to comply with its obligations under the claims co-operation clause. It does not expressly provide that the reinsurers shall not be liable to pay if Allianz breaches any of its obligations under the claims co-operation clause as in *Eagle*'s case.

[39] Having examined the opening phrase, we are unable to countenance the position taken by Chubb. We accept that parties can contract out of, or limit, the follow settlements clause but clear words would be required to prevent a reinsured from enforcing a settlement against the reinsurer under the follow the settlements clause. In interpreting a claims co-operation clause, the court must adopt the interpretation that best serves the underlying purpose of the reinsurance contract. Reinsurance is a vital part of the insurance machinery that allows business to operate and thrive. It provides support for insurance companies to accept significant risks for a wide array of subject matter and this supports and drives the engine of the economy. The reinsured must have confidence that when they cede risks, those risks do not become uninsured.

[**40**] As pointed out by the trial judge, Chubb is not an inexperienced reinsurer. In our view, the claims cooperation clause would have used words that are appropriate if it was the intention of the parties to impair the efficacy of the follow settlements clause. We accept Allianz's contention that in insurance and reinsurance contracts it is imperative that parties wishing to modify the scope of the follow the settlements clause should do so clearly and unambiguously.

[41] We therefore share the trial judge's view that the manner in which the claims cooperation clause was drafted reflects that it was not the intention of the parties that the claims cooperation clause takes precedence over the follow the settlements clause. The fact here is that the clause does not say Allianz must comply with the claims cooperation clause before it can take the benefit of the follow the settlements clause. In such a circumstance, the claims cooperation clause should be given an interpretation which favours the true purpose of the reinsurance contract, which is to give the reinsured protection from having to bear a large loss on its own.

[42] We thus reject Chubb's submission that compliance with the claims cooperation clause was a condition precedent to any liability on its part under the policy to indemnify Allianz.

Whether Allianz Complied With The Claims Cooperation Clause

[43] That brings us to the second issue, which is whether Allianz complied with its obligations under the claims cooperation clause in the settlement of the claim. It is true that the trial judge made no express finding on this issue, but it is evident from paras. 125 to 150 of his judgment that he was satisfied that Allianz had complied with its obligations under the claims cooperation clause.

[44] There is no dispute here between the parties that Allianz's obligations under the claims cooperation clause was to:

(i) give written notice as soon as reasonably practicable of any claims made under the policy;

(ii) furnish all information known to Allianz in respect of the claim and to keep the reinsurers fully informed of all developments as long as reasonably practicable; and

(iii) cooperate with reinsurers in the investigation, adjustment and settlement of the claim.

[45] We pause at the juncture to make an observation that Chubb is correct in its criticism that it makes the learned trial judge had misconstrued Chubb's case to be one requiring Allianz to obtain Chubb's approval before settling the claim. We accept that Chubb's case in the court below, and here, has always been that Allianz's right to rely upon the follow the settlements clause was conditional upon it complying with its obligations under the claims

cooperation clause. It is Chubb's case that Allianz is not entitled to seek reimbursement as it was in breach of its obligations under sub-cls. (b) and (c) of the claims cooperation clause.

[46] It bears mention that Chubb accepted that the claims cooperation clause in this case is not the *Scor* type of clause and its approval or consent was not required for a settlement. It is also not in dispute that under the claims cooperation clause Chubb had no right to control or to be involved directly in the claims handling process, negotiations and settlement that took place. Equally, it is not in dispute that Allianz, as the lead insurer, was entitled to settle the underlying claim with Prai and in so doing, it was only required to cooperate and keep the reinsurers informed and updated.

Subclause (b)

[47] As noted earlier, it is Chubb's case that Allianz is not entitled to seek reimbursement as it was in breach of its obligations under sub-cls. (b) and (c) of the claims cooperation clause. We deal first with Chubb's complaint that there was a breach of sub-cl. (b). It is argued that Allianz failed to provide material information which included two critical documents, namely the LTSA (at [6]) and the GLA recovery report in relation to Prai's claim. The GLA recovery report was a legal opinion given by Allianz's lawyers on the prospects of recovery against GE for the catastrophic breakdown.

[48] These arguments can be briefly dealt with. It is important to point out that Chubb's witness (DW1) who was personally involved in this claim, acknowledged that Allianz had provided all information relating to the claim to all reinsurers including Chubb and that there was no complaint of not receiving information. In the face of DWTs admission, Chubb's complaint about Allianz failing to provide material information, is baseless.

[49] Apropos the LTSA, it is true that Chubb had requested for the LTSA but the same was not provided. These facts are not in dispute. Allianz refused to produce the LTSA because of a non-disclosure agreement it had signed with GE. GE had insisted that the agreement be signed before Allianz could send its adjusters to the plant as it took the position that the LTSA was confidential information as it contained substantive technical details relating to maintenance and service methodologies for the equipment. Chubb then made an application in the High Court for discovery of the LTSA. The application was dismissed and the decision was affirmed by the Court of Appeal. Chubb also failed to obtain leave in the Federal Court. Oddly, despite taking the position that the LTSA was an important document, Chubb did not refer to this document in any of its witness statements when it subsequently managed to obtain a copy of the same in another suit involving GE.

[50] It is Chubb's contention that Allianz by disabling itself from producing the LTSA by signing the non-disclosure agreement was in breach of sub-cl. (b). It is said that under s. 40 of the Contracts Act 1950, if the party refused to perform, or disabled himself from performing his promises, then the contract will come to the end, unless he has signified, byword or conduct, his acquiescence in its continuance.

[51] We are not persuaded that there was a breach of s. 40 as Allianz had no choice but to sign the agreement by reason of the position taken by GE. In any event, Chubb's failure to refer to the LTSA in its witness statements once it obtained a copy of the same refutes its allegation that it was an important document for the purposes of the claim made by Prai.

[52] As for the GLA recovery report, it is difficult to fathom how it is relevant to the claim when it deals with the prospects of recovery against GE once Prai's claim was settled. Further, the evidence shows that that Allianz was willing to disclose the GLA report on Chubb confirming that it was not involved in providing any liability coverage to GE so as to avoid disclosing information to a counter party in litigation to its detriment Chubb, however, did not cooperate.

[53] For these reasons, we agree with the trial judge that Chubb's complaints about LTSA and GLA recovery report are also baseless. On the evidence, Allianz had valid reasons and was entitled to withhold disclosure of the documents on the basis of conflict of interest and confidentiality.

Sub-clause (c)

[54] We deal now with Chubb's complaint that there was a breach of subclause (c). Chubb complained that Allianz had settled the claim with Prai without giving prior notice of its intention to do so and thereby denying it a reasonable opportunity to provide its views on the issue of policy cover before Allianz conveyed a position on these issues to Prai. Additionally, it is argued Allianz's failure to cooperate by refusing to work with its adjuster, Integra, also constitutes a breach of the claims corporation clause.

[55] As regards to Chubb's complaint that Allianz had settled the claim with Prai without prior notice, we find it to be without any factual basis. Allianz's letter to the reinsurers, circulated *via* the brokers dated 19 January 2016 clearly gave notice that it accepted the solicitors' legal opinion that the claim was payable and intended to pay the claim. It bears mention that the claims corporation clause here does not require Allianz to notify Chubb of its intention to settle.

[56] We find ourselves unable to agree with Chubb's complaint that Allianz did not cooperate on its queries on policy cover. The relevant facts are these. Allianz had been advised by its team of experts, comprising the adjusters, technical consultants and lawyers that Prai's claim is payable. It

accepted the advice given. Chubb, on the other hand, took the position that the claim is not payable and that Allianz ought to have relied on the exclusion clauses which would have precluded Prai from claiming under the original policy. On the evidence, it is clear that Chubb was given the opportunity to express its views on whether Prai's claim was payable. Allianz as the lead insurer had considered Chubb's views on the claim and the exclusion clauses but decided instead to go with the views expressed by its experts. Under the claims cooperation clause, Allianz was entitled to seek Chubb's opinion on any issue relating to the claim but the former was not bound or obliged to accept such views.

[57] As for Chubb's complaint that Allianz had refused to work with Integra Technical Services, we find it to be also baseless as there was no obligation on the part of Allianz to do so. There was nothing in the claims cooperation clause which permitted Chubb to engage its own loss adjusters to investigate the underlying loss. It did not give Chubb the right to handle any part of the claim brought by Prai under the original policy. To yield to Chubb's argument would result in chaos and confusion as this would mean that each reinsurer would be entitled to appoint its own adjusters to investigate the underlying loss which tantamount to giving Chubb's control over the negotiations and settlement when it has no right to be involved in the claims handling process.

[58] We accept Allianz's submission that the evidence demonstrates that it had cooperated with Chubb on the claim. We also share the trial judge's view that the relations between Chubb and Allianz deteriorated because Chubb was adamant in wanting Allianz to follow its way of handling the claim and the fact that Allianz did not, does not *ipso facto* mean that Allianz was in breach of the claims cooperation clause.

[59] In the premises, though the trial judge made no specific finding on whether Allianz had breached the claims cooperation clause but he made a finding that Allianz had acted in good faith and in a business-like manner in settling Prai's claim. This must necessarily mean that Allianz had complied with its obligations under the claims cooperation clause. We affirm the trial judge's finding on this issue. It is trite that an appellate court would be very slow to interfere in such factual finding unless it is plainly wrong and perverse.

Whether Allianz Entitled To Invoke The Follow The Settlements Clause To Seek Reimbursement From Chubb In Respect Of The Settlement With Prai

[60] We shall now address Chubb's submission that even if it is determined that Allianz is entitled to rely on the follow the settlements clause, it nevertheless has not met the requirements laid down in the *Scor* case in order to be able to recover under the follow the settlements clause.

[61] The follow the settlements clause is based on the principle of good faith and requires the reinsured to act in good faith to recover under it. The following observations by Robert Golf LJ in *Scor* are especially apposite:

> In my judgment, the effect of a clause binding reinsurers to follow settlements of the insurers, is that the reinsurers agree to indemnify insurers in the event that they settle a claim by their assured, *ie*, when they dispose, or bind themselves to dispose, of a claim, whether by reason of admission or compromise, provided that the claim so recognized by them falls within the risks covered by the policy of reinsurance as a matter of law, and provided also that in settling the claim the insurers have acted honestly and have taken all proper and business-like steps in making the settlement ...
>
> In my judgment, they must follow the settlement, as they have contracted to do so.

[62] The parties are in agreement that Chubb would be entitled to recover under the follow the settlements clause to indemnify Allianz on the latter fulfilling two requirements;

(i) that the claim settled by Allianz falls within the reinsurance contract as a matter of law; and

(ii) Allianz had acted in an honest and business-like manner in handling the claim.

[63] It is Chubb's contention that the trial judge fell into error in coming to the conclusion that Allianz had fulfilled both requirements. As regards the first requirement, it is submitted that the claim does not fall within the reinsurance contract as a matter of law as the claim was not in respect of a sudden and foreseeable loss. It is argued that Allianz should not have settled the claim with Prai because the breakdown of the powerplant was an inevitable loss, as opposed to a sudden and foreseeable loss. Chubb contended that only a sudden and foreseeable loss comes within the scope of the reinsurance contract.

[64] We reject this submission as there is no evidence to show that the catastrophic breakdown was inevitable and not a sudden and foreseeable loss. In any event, in our judgment, given that there is a back-to-back coverage between the original policy and the reinsurance contract as reflected in the follow the settlements clause, there is no obligation to prove that the loss fell within the original policy. See *Aegis English Electrical And Gas International Services Ltd v. Continental Casualty CA* [2008] Lloyd's Report 17 and *Insurance Co Of The State Of Pennsylvania v. Grand Union Insurance Co Ltd & Anor* [1989] LRC (Comm) 55. Given the importance of the follow the settlements clause, we set it out again;

A The Reinsurance is subject to the same Terms, Clauses, Warranties, Exceptions, Conditions, Extensions and Endorsements as the original and follows its settlement as far as applicable here to (excluding rate, retention and limit).

[65] We therefore affirm the finding made by the trial judge that the claim B that Allianz settled with Prai falls within the reinsurance as a matter of law.

[66] With respect to the second requirement, Chubb argued that Allianz did not act in an honest and business-like manner in handling the claim with Prai as Allianz ought to have relied on the exclusion clauses (exclusion cls. 4, 5 and/or 7) to deny Prai's claim. The question of whether a settlement C is entered into through "proper and business-like steps" is contextual and depends on the facts of each case. The judge opined that the issues raised by Chubb to contend that Allianz did not act honestly and in a proper and business-like manner when it processed and allowed Prai's claim were without substance. The trial judge also gave reasons as to why none of the D exclusion clauses applied:

[164] What must be determined by this Court is whether Allianz was justified in accepting the advice of GLA in conceding that it would be difficult to establish a case against Prai in order to invoke the exclusions.

[165] It is the view of this Court, Allianz was entitled to rely on GLA as E their expert on the interpretation of the exclusions. If GLA in their expert view is of the opinion that the case against Prai would not be successful given the facts and the wordings of the clause, it was incumbent on Allianz to decide on the advice given.

[166] It is the view of this Court that Allianz had rightly made the finding F that the exclusions do not apply.

[167] On Exclusion 4, it is clearly not jus TJSB services being the MRO contractor, was covered under the Policy. GE and its companies (including Granite) on the other hand are the main maintenance contractors. They are identified as the Additional Insured in the Policy. Thus, all G maintenance contractors are covered under the policy resulting in the non-applicability of Exclusion 4.

[168] On Exclusion 5, it is clear that the mental element of Prai needs to be proven if Allianz were to challenge the applicability of Exclusion 5. More importantly, Prai had the knowledge of the technical defects inherent in the design and Prai knew that the defects were such as would H ultimately cause the domestic object damage leading to the catastrophic breakdown. This clearly meant that it was an onerous task to prove such knowledge. To concede on this point would not be unreasonable.

[169] On Exclusion 1, it is difficult if not impossible to prove that the damage caused by the domestic damages was not accidental. In other I words, Prai knew that the wear and tear would result in the liberation of the ill fatted S5V1 vane that went on to cause the domestic object damage and eventual damage to the turbine. It was therefore not unreasonable to concede on this point.

[67] We see no reason to disturb the judge's finding on this issue. We agree with the trial judge that the exclusion clauses were rightly determined to be inapplicable by Allianz.

[68] It is plain and clear that Allianz acted with utmost good faith, and in a business-like manner, when processing and settling Prai's claim. It duly notified the reinsurers when the claim was made and appointed international loss adjusters with substantial experience to investigate into the loss. The reinsurers were kept informed of the claims handling throughout and the adjuster provided updates and advice consistently. Allianz also appointed experienced technical consultants to conduct investigations into the root cause of the catastrophic damage. It also appointed an experienced legal advisor based in Singapore with extensive experience and expertise and substantial reputation to provide a legal opinion. It was advised that Prai's claim was payable as the exclusion clauses in the original policy did not apply. It was entitled to act on that advice. On receipt of McLarens' final report, Allianz negotiated and concluded a settlement with Prai at a reduced sum of RM71.5 million.

[69] It is common ground that there were other reinsurers involved in this case. Apart from Chubb, they included Munich Re, Lonpac, and Scor Re. Munich Re acted as the lead reinsurer. All the other reinsurers followed Allianz's settlement. It is true that at the initial stage Munich Re and Chubb had appointed lawyers Kennedys to question Allianz's settlement. They took a common position in raising questions regarding Allianz's claim handling process but subsequently Munich Re agreed to follow Allianz's settlement.

[70] We accept that Chubb is entitled to hold a different view from Munich Re but it is unlikely that all the reinsurers would have followed Allianz's settlement if indeed Allianz had not acted properly and in a business-like manner in settling Prai's claim. On the facts, we agree that the trial judge was right in concluding that Alliance had acted in a professional and business-like manner in handling and settling the claim. His finding is unimpeachable and does not warrant appellate intervention.

[71] Before we conclude, we will deal briefly with Chubb's appeal on the decision of the trial judge to award pre-judgment interest of 5% per annum to Allianz, and Allianz's cross-appeal in respect of the award of RM120,000 by the trial judge to compensate it for disbursements and expenses.

[72] As for pre-judgment interest, the law is clear. Section 11 of the Civil Law Act 1956 vests discretionary power on the court to award pre-judgment interest in respect of the recovery of debt and damages by a party. The trial judge had exercised his discretion to award interest to Allianz, and there is no reason here to disturb it. Equally, we find no merit in the cross-appeal as Allianz is only entitled to recover disbursements which are necessary for

A the litigation, and only to the extent that they are reasonable. Allianz's claim for a upward revision of the disbursement sum to RM448,284.94, in our view, is unreasonable. As such, there is no reason for this court to intervene to vary the award.

Conclusion

B

[73] For the reasons given, the main appeal is dismissed with costs of RM50,000 to be paid by Chubb to Allianz subject to allocator. Chubb's appeal on the award of prejudgment interest and Allianz's cross-appeal are also dismissed. Each side to pay costs of RM20,000 to the other, subject to allocatur.

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